No. 92-1934

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Supreme Court, U.S.
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J.M., Individually,

Petitioner,

v.

V.C., *et al.*,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF UNIVERSITY FACULTY FOR LIFE, AMERICAN ASSOCIATION OF PRO LIFE OBSTETRICIANS AND GYNECOLOGISTS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, HOLSTON BAPTIST ASSOCIATION, LIBERTARIANS FOR LIFE, NATIONAL FEDERATION OF CATHOLIC PHYSICIANS GUILD, PROFESSOR ANTHONY ANDRES, REV. BENEDICT ASHLEY, JAMES J. CARBERRY PH.D., PROF. WILLIAM F. COLLITON, JR., M.D., F.A.C.O.G., PROFESSOR JOHN M. FINNIS, F.B.A., REV. JOHN F. HARVEY, PROFESSOR DIANNE N. IRVING, PH.D., MR. BRENDAN KELLEY, PROFESSOR C. WARD KISCHER, PH.D., HANNA KLAUS, M.D., F.A.C.O.G., PROFESSOR DOUGLAS W. KMIEC, J.D., PROFESSOR WILLIAM E. MAY, PH.D., PROFESSOR RALPH McINERNEY PH.D., EDMUND D. PELLEGRINO, M.D., PROFESSOR CHARLES RICE, J.D., EDWARD SHERIDAN, M.D., F.A.P.A., PROF. RICHARD STITH, J.D., PH.D. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

University Faculty for Life and other amici hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents has refused consent.

University Faculty for Life (UFL), founded in 1989, is a nondenominational organization of more than 400 faculty members from 80 colleges and universities in the United States. UFL seeks to ensure that public policy on abortion is grounded on current and reliable scientific, medical, philosophical and other scholarly information. UFL favors human life, disfavors abortion and requests that the Court grant J.M.'s Petition for Certiorari so that the Court can consider the medical and scientific consensus that now exists on when the life of a human being begins.

The American Association of Pro-Life Obstetricians and Gynecologists is an organization dedicated to protect-

ing and preserving human life at all stages. David J. Martin, M.D., LTD. of St. Louis, Missouri, is President of the Association.

The Christian Life Commission is the moral concerns and public policy agency for the Southern Baptist Convention, the nation's largest Protestant denomination, with over 15.4 million members. The Commission is charged with addressing public policies affecting the sanctity of human life, the integrity of marriage and the family. The Southern Baptist Convention's members are overwhelmingly opposed to abortion. On behalf of the members, the Commission requests this Court to reconsider the issue of when the life of a human being begins. This issue was left undecided in *Roe v. Wade.*

The Holston Baptist Association represents over 35,000 Baptists in northern Tennessee, and seeks to give leadership and direction for a common voice in matters of social concern, including the rights of the pre-born.

Because Libertarians for Life oppose government encroachments, National Co-ordinator Doris Gordon of Wheaton, Maryland, hereby requests this Court to reconsider when a human being begins life.

National Federation of Catholic Physicians Guilds, Elm Grove, Wisconsin, is comprised of Catholic Physicians Guilds across the United States. Providing skill and experience in the medical field it promotes medical ethics and supports the view that the life of each individual begins at conception. George Isajiw, M.D., is president of the Guilds.

Professor Anthony Andres, Ph.D., is professor of philosophy at Christendom College, Front Royal, Virginia.

Rev. Benedict Ashley, O.P., professor of moral theology and medical ethics, represents the Pope John XXIII Medical Moral Research and Education Center, Braintree, Massachusetts.

James J. Carberry, Ph.D., is professor of chemical engineering at the University of Notre Dame, Notre Dame, Indiana.

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Professor John M. Finnis, F.B.A., is professor of law and philosophy at University College, University of Oxford, England.

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Professor Ralph McInerney, Ph.D., is the Michael P. Grace Professor of Medieval Studies at the University of Notre Dame, Notre Dame, Indiana.

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QUESTION PRESENTED

Whether the human *being*, whose life begins at conception as demonstrated by scientific and medical consensus, is also a legally protected *person* from fertilization through adult death.

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INTEREST OF AMICI CURIAE

The University Faculty For Life encourages scholarly research used in public policy on abortion.

SUMMARY OF ARGUMENT

University Faculty for Life (UFL) adopts and supports the position of the Petitioner that there is now a scientific consensus that the life of every human being begins at fertilization. This brief demonstrates that every human *being* is simultaneously a human *person* from the moment of *fertilization*. No real valid scientific or philosophical distinction can be made between a human being and a human person after fertilization. Arguments for "personhood" at various biological marker events during human embryogenesis or after birth cannot be sustained either scientifically or philosophically.

ARGUMENT

In support of the Petitioner UFL argues here that there is no distinction between a human being and a human person from fertilization on. However, some argue that there is no human person present until the 2-cell, 5-6 day, 14 day, various brain-related ("rational attributes", or sentience), or early childhood stages of human development—and *therefore* no Constitutional rights and protections are due until those developmental stages. UFL argues against such claims and for "personhood" at fertilization, because the accurate scientific evidence and an objectively based philosophy demonstrate this; whereas the arguments for "delayed personhood" are based on inaccurate science, and theoretically and empirically refutable philosophical definitions. The term "human being" is co-extensive with the term "human person" from fertilization on, and *therefore* a human being is due constitutional rights and protections at fertilization.

A. The Correct Science And A Realistic Philosophy Demonstrate No Distinction Between A Human Being And a Human Person

First, it is important to understand that our argument is based only on logic, science and philosophy—not on religion or theology.

Second, it is critical for this Court to consider the logical outline and conclusions of the alternative arguments. It is claimed that certain (different) degrees of physiological development are the *physiological preconditions* for the capacities of "rational attributes" or "sentience"—i.e., the preconditions for "personhood". But the specific humanly functioning physiological precondition for all such physiological preconditions is the functioning human zygote itself formed at fertilization. Thus these arguments for "preconditions" fail.

Or it is claimed that a human person should be defined only in terms of the *actual exercising* of either (1) "rational attributes", or of (2) "sentience", or brain integration. However, empirically, the exercise of either full "rational attributes", sentience or brain integration cannot take place until years after birth; and some higher primates are more sentient than normal human infants or young children. Therefore many populations of human beings would *not be persons,* and this Court would be required to permit: the denial of health care or other legal benefits and protections; or their treatment as "animals", e.g., used in experimental medical research or religious sacrifices, or unrestrictedly harvested for organs; or the infanticide of normal healthy human infants and young children. Such human populations would also include: patients with Alzheimer's or Parkinson's disease, multiple sclerosis, the mentally ill, the depressed, alcoholics, drug addicts, the comatose, etc.

Given these critical logical precisions we will proceed with our argument. Accurate scientific evidence demonstrates *unequivocally* that the life of every human being begins at fertilization. Although fertilization is a process, within that process there is a point in time and space when an individual human being begins. The "23" chromosomes of the sperm which are different from the "23" chromosomes of the ovum combine during fertilization to form a human zygote with *"46"* chromosomes. These chromosomes are qualitatively different from either parent,

and are the specific number characteristic of the human species [1] (and not simply of the genus "animal").[2]

Immediately the human zygote produces specifically *human* proteins and enzymes; [3] *no genetic* information is gained or lost; and this genetic information *cascades* throughout embryogenesis.[4] Thus the human zygote ultimately directs and is the cause of virtually *all* of the processes of human development after fertilization, including: [5] molecular information, methylation, cell division, totipotency, differentiation, implantation, formation of the primitive streak, nerve net and full brain integration—and all developmental and growth processes after birth. *Physiologically there is no break or distinction during the entire continuum of human development* (even if there is twinning). Therefore scientifically it is clear that the human zygote formed at fertilization is specifically and characteristically a new real existing individual human being. Even if some human zygotes are spontaneously aborted, such external circumstances do not change the internal "nature" of the human zygote as a human being.

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[1] K.L. Moore, *The Developing Human* (Philadelphia: W.B. Saunders Co., 1982, 3rd ed.), 14ff; B. Lewin, *Genes III* (New York: John Wiley and Sons, 1987), 24ff.

[2] Lewin (1987), ibid., 386-394, 401; A.E.H. Emery, *Elements of Medical Genetics* (New York: Churchill Livingstone, 1993), 93; A. Schniecke et al, "Introduction of the human pro alpha 1(I) collagen gene into pro lapha 1(I)-deficient Mov-13 mouse cells leads to formation of functional mouse-human hybrid type 1 collagen", *Proceedings of the National Academy of Science-USA* 84:3 (Feb. 1987), 764-8.

[3] G. Kollias et al, "The human beta-globulin gene contains a downstream developmental specific enhance, "*Nucleic Acids Research* 15:14 (July 1987), 5739-47; R.K. Humphries et al, "Transfer of human and murine globin-gene sequences into transgenic mice," *American Journal of Human Genetics* 37:2 (1985), 295-310.

[4] Emery (1983), op. cit., 103; Mavilio et al, "Molecular mechanisms of human hemoglobin switching: selective undermethylation and expression of globin genes in embryonic, fetal and adult erythroblasts," *Proceedings of the National Academy of Sciences-USA* 80:22 (1983), 690.

[5] Lewin (1987), op. cit., 681; Emery (1983), op. cit., 93.

There must be a direct relationship between these scientific facts and any objectively based philosophical definition of a "human being" if our philosophical concepts are to accurately reflect reality. Not all philosophical definitions are relative. Some are empirically based; others are not. It is possible to have an *objectively* based philosophical definition of a human being if a realistic method is employed.

A realist philosophy *begins* its deliberations and grounds its concepts and definitions on this accurate science, and *checks back* to it to determine their truth or falsity.[6] If the concepts and definitions correlate with the scientific evidence, then they are true; if not, then they are false. Philosophical definitions use terms which reflect the "*nature*" of a thing, determined empirically by observing the specific and characteristic *kinds of actions and functions* a thing performs. This is the obvious reasoning principle behind any basic scientific research: function follows form.[7] Sodium burns orange, cobalt burns blue—bacteria can only be grown on specific culture medium. Birds can fly, but human beings and gorillas cannot; giraffes can produce "giraffe" proteins, enzymes and embryos; but corn stalks or human beings cannot. This is how things are scientifically categorized into natural *kinds*.

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[6] G. Klubertanz, *Introduction to the Philosophy of Being* (New York: Appleton-Century-Crofs, 1963); E. Gilson, *Being and Some Philosophers* (Toronto: Pontifical Institute of Mediaeval Studies, 1949); D. Irving, "Science, philosophy, theology-and altruism: the *chorismos* and the *zygon*" in H. May, M. Streignitz, P. Hefner (eds.), *Loccumer Protokolle* (Rehburg-Loccum: Evangelische Akademic Loccum, 1992); Irving, "Scientific and philosophical expertise; an evaluation of the arguments on 'personhood'", *Linacre Quarterly* 60:1 (Feb. 1993), 21-22; Irving, "The impact of scientific 'misinformation' on other fields; philosophy, theology, biomedical ethics, public policy", *Accountability in Research* 2:4 (April 1993), 244-249.

[7] Lewin (1987), op. cit., 11-13, 30; Emery (1983), op. cit., 101-103.

Applying this principle, a realist draws from the accurate embryological information to explain and determine what has taken place, and if and when a human being exists. It concludes philosophically from the above scientific facts that at fertilization a *substantial* change (i.e., a change in "natures") has taken place. *Before* fertilization, only a sperm and an ovum exist, which each contain only "23" chromosomes. They cannot produce specifically human enzymes or proteins or functionally develop into a human zygote or human being even if implanted singly in the womb. They must first recombine. *After* fertilization a different "nature" exists—i.e., a human being, and subsequently there is only *accidental* change (i.e., only a change in growth and development).[8] The human zygote now contains "46" chromosomes, produces specifically human enzymes and proteins, tissues and organs, and does not gain or lose any genetic information. Only human growth and development take place —and only through the agency of the genetic and other information ultimately contained in the original human zygote. Thus at fertilization the matter is "appropriately formed"[9]—it is humanly formed and it is functioning and acting humanly. Philosophically we conclude, then, that a *human being* exists after fertilization.

We can also conclude philosophically that the human zygote possesses the *potency*[10] (capacity) to direct its

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[8] H.B. Veatch, *Aristotle: A Contemporary Approach* (Indiana: Indiana University Press, 1974), Chap. 2, 3; G. Klubertanz, *The Philosophy of Human Nature* (New York: Appleton-Century Crofts, 1953, 124ff).

[9] Klubertanz (1953), *ibid.*, 312; B. Ashley, "A critique of the theory of delayed hominization", in D.G. McCarthy and A.S. Moracrewski (eds.), *An Ethical Evaluation of Fetal Experimentation: An Interdisciplinary Study* (St. Louis: Pope John Center, 1976), 113-133.

[10] Aristotle, in R. McKeon (ed.), *The Basic Works of Aristotle* (New York: Random House, 1941), "Metaphysica" (Book Theta) 9.1.10461-9.8.105b, p. 826-831; T. Aquinas, *On Being and Essence*, A. Mauer (trans.) (Toronto: The Pontifical Institute of Mediaeval Studies, 1983), 58, 62-63.

own continuous development. This potency is possessed by an already existing individual human being. Therefore, the human zygote is *not* a "possible" or "potential" human being or human person—i.e., one that does not yet exist—but an *already existing* and *functioning* human being with a potency to *develop* itself further.

But is it a human "person"? Just as the law does not distinguish between a human being and a human person, neither does a realist philosophy. Definitionally there is *no philosophical distinction between a human being and a human person,* because the *terms are co-extensive.*[11] The definition of a human being includes the *entire* complex concrete being—including the characteristic "vegetative" and "sensitive" powers, and the "rational" power of thinking and choosing—as well as the human body. Thus there are no real "splits" among the human powers, nor between those powers and the body. If there are no splits, the entire human being—including all of his or her powers—must be present *simultaneously* when the human being begins, at fertilization.

The human zygote (or embryo or fetus) not only possesses the real and presently existing *capacity* of a human being; it is also *exercising* that capacity by acting in a human—i.e., a "rational"—way. This is confirmed once again by the accurate scientific evidence. If there were only "vegetative" powers present at fertilization, the human zygote would not "know" how to direct the formation of specifically *human* enzymes and proteins—only "vegetative" ones. If there were only "sensitive" or "animal" powers present, the human zygote would not "know" how to direct the formation of specifically *human* tissues

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[11] K. Doran, "Person—a key concept for ethics," *Linacre Quarterly* 56:4 (1989), 39; Aristotle, *De Anima,* in McKeon (1941), op. cit., 1.4.411b, 14-18 and 24-28, p. 554; T. Aquinas, *Summa Theologica,* Fathers of the English Dominican Provence (trans.), (Westminster, MD: Christian Classics, 1981), v. 1, I.a.q.29,a.1, ans., ad. 2,3,4, p. 156; R. Barry, "Self-consciousness and personhood", *Linacre Quarterly* 46:2 (1979).

and organs—only "animal" ones. However, scientifically we observe that specifically *human* proteins and enzymes, tissues and organs are produced from fertilization on.

If the human being is scientifically demonstrated to be present at fertilization; and if specifically human products and organs are formed from fertilization on; and if a human being is realistically defined *inclusive* of all of its powers (which cannot be split from each other or from the body); then all of these powers must be present when the human being is present—at fertilization—including the "rational" power of thinking and choosing.

Thus *there is no scientific or philosophical distinction between a human being and a human person.* A human being who is simultaneouly a human person is present at fertilization, and acting humanly. Since every human being is constitutionally due his or her rights and protections, and since the life of every human being begins at fertilization, then every human being is due those rights and protections from fertilization on—including the unborn child of J.M.

B. Arguments for "Delayed Fetal Personhood" Are Based On Inaccurate Science

Some are currently arguing that "personhood" is only a "social construct",[12] or that even though there is a human *being* present at fertilization, there is no human *person* present until some later biological "marker event" during the continuum of human embryological development. These writers make a *real distinction* between a human being and a human person—and only human persons are due social, ethical or legal rights and protections. The main purpose of this section is to point out the serious scientific discrepancies in the science used in these "delayed fetal personhood" debates.[13] *Different conclu-*

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[12] J.A. Robertson, "Extracorporeal embryos and the abortion debate", *Journal of Contemporary Health Law and Policy* 2:53 (1986), 53-70.

[13] See, e.g., D. Irving, *Philosophical and Scientific Analysis of the Nature of the Early Human Embryo* (Doctoral Dissertation,

sion about "personhood" follow from different sets of scientific evidence. Their arguments are as follows:

Some argue that the early human embryo is only a "blob", a lump of the mother's tissues, and not a human being. Others, e.g., Suarez [14], claim that a human person begins only at the 2-cell stage, *with the completion of the genetic input* of the program "man". However, the human embryo is not a "blob" or a piece of the mother's tissues. The mixture of chromosomes in the human embryo is *unique* for that single embryo and *different* from those in either the mother or the father. The human embryo *is* a human being—as vertified by placing it under a microscope and counting the number of chromosomes—i.e., "46". Finally, at fertilization the *completion* of the genetic input has already taken place at the 1-cell human zygote stage.

Bedate and Cefalo [15] argue that the human zygote is not a person; it is *not specifically human* and does not

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Washington, D.C.: Georgetown University, 1991), see summaries pp. 23, 53, 59, 70, 82, 114, 131, 145, 169, 205, 245, 247, 259; C.W. Kischer, "Human development and reconsideration of ensoulment", *Linacre Quarterly* 60:1 (Feb. 1993), 57-63; J.J. Carberry and D.W. Kmiec, "How law denies science" *Human Life Review* 18:4 (1992), 105; A. Fisher, "Individuogenesis and a recent book by Fr. Norman Ford", *Anthropotes* 2 (1991), 199ff; W.E. May, "Zygotes, embryos, and persons", *Ethics and Medics*, Part I 16:10 (Oct. 1991); B. Ashley, "Delayed hominization: Catholic theological perspectives," *The Interaction of Catholic Bioethics and Secular Society*, R. E. Smith (ed.) (Braintree, MA: The Pope John Center, 1992), 163-180; A. Regan, "The human conceptus and personhood", *Studia Moralis* 30 (1992), 97-127; P. McCullagh, *The Foetus As Transplant Donor: Scientific, Social and Ethical Perspectives* (New York: John Wiley and Sons, 1987); A.A. Howespian, "Who or what are we?", *Review of Metaphysics* 45 (March 1992), 483-502. G. Grisez, "When do people begin?", *Proceedings of the American Catholic Philosophical Association* 63 (1990), 27-47.

[14] A. Suarez, "Hydatidiform moles and teratomas confirm the human identity of the preimplantation embroyo," *Journal of Medicine and Philosophy* 15 (1990); 627-635.

[15] C. Bedate and R. Cefalo, "The zygote: to be or not be a person", *Journal of Medicine and Philosophy* 14:6 (1989), 641; see

contain *"information" about differentiation.* It only contains enough *genetic* information to proceed through the *blastocyst* stage. After that, differentiation and the other processes of embryogenesis depend on *molecular* information from the mother, "information" not present in the zygote. Also, the developing embryo can give rise to biological entities which are *not* human beings, i.e., hydatidiform moles and teratomas. But empirically we know that the human zygote *is* specially human and does *contain and control* all of the genetic information of *all* of the processes of embryogenesis, including differentiation and those processes past the blastocyst stage. Considerable scientific evidence has already been noted demonstrating that specifically *human* enzymes and proteins are produced after fertilization. It has also been demonstrated precisely that differentiation is caused by the genetic information in the developing embryo and *not by the mother.*[16] Even *molecular* information arising wtihin the embryo is determined ultimately by the *genetic* information in the one-cell zygote (by means of its "genetic information *cascade*"). *Molecular* information from the mother is only selectively *used* by the embryo. Such molecular information does not change the very *nature* of the human zygote. Finally, hydatidiform moles and teratomas *do not arise from genetically normal embryos,*[17] but from abnormal entities

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also, Thomas J. Bole, III, "Metaphysical accounts of the zygote as a person and the veto power of facts", *Journal of Medicine and Philosophy* 14 (1989), 647-653; also Bole, "Zygotes, souls, substances, and persons", *Journal of Medicine and Philosophy* 15 (1990), 637-652.

[16] H. Holtzer, J. Biekl and B. Holtzer, "Induction-dependent and lineage-dependent models for cell-diversification are mutually exclusive," *Progress in Clinical Biological Research* 175 (1985), 3-11; Mavilio et al (1983), op. cit., 664-8; C. Hart et al., "Homeobox gene complex on mouse chromosome II: molecular cloning, expression in embryogenesis, and homology to a human homeo box locus", *Cell* 43:1, (1985), 9-18.

[17] A.E. Szulmann, U. Surti, "The syndromes of hydatidiform mole. I. Cytogenic and morphologic correlations," *American Journal of Obstetrics and Gynecology* 131 (1978), 665-671; M.S.E. Wimmers, J.V. Van der Merwe, "Chromosome studies on early

(usually caused by dispermy or parthenogenic eggs; parthenogenesis in humans has never been reported [18]) which are *not*, therefore, genetically normal human beings to begin with.

McCormick and Grobstein [19] claim that "personhood" ("ensoulment") cannot take place until about 14 days. Before then there is only a *genetic* individual (a "potential" person); after, there is also a *developmental* individual—i.e., a real human person. After fertilization the human zygote undergoes *equal* divisions; after the third division the aggregate contains 8 cells "loosely connected". These cells are totipotent (each can produce a complete adult human being), so they are not *developmentally* single—and therefore, not a person. Before 14 days there is only a "pre-embryo" (a "non-person"). That is, at the 5-6 day stage, development does not primarily involve formation of the embryo and its parts [i.e., the inner blastocyst layer of cells] but the "non-embryonic" trophoblast [i.e., the outer layer of cells]. After birth *all of the cells from the trophoblast layer are discarded* as the placenta, etc. The presence of this non-essential trophoblast layer of cells indicates that the 5-6 day "pre-embryo" is not yet developmentally single, and therefore not a person. Also, individuality is not present before 14 days because: a) if *two* eight-cell stages of different parentage are *fused, a single* adult is produced, and; b) until 14 days and the formation of the primitive streak *twinning* can take place by division of the inner cell mass. After 14 days *twinning cannot take place* and the organism is finally "developmentally" single (and therefore a person). Finally, a developmental individual is not present until a single body axis (primitive streak) has begun to form, near the end of the *second post-fertilization week* when *implantation* is under way.

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human embryos fertilized *in vitro*," *Human Reproduction* 7 (1988), 894-900.

[18] Moore 1982, op. cit., 32.

[19] Richard McCormick, S.J., "Who or what is the preembryo?", *Kennedy of Ethics Journal* 1:1 (1991), 1.

However, empirically we know that the cells do *not* divide equally, but unequally. Also, totipotency is scientifically far more complicated than depicted. E.g., these cells do *not* each contain the same potential as each other or as the zygote. Totipotency is *normal*, and actually coded for by the genetic information in the human zygote. These cells are totipotent because certain genes have not yet been *silenced* by methylation (and other processes)—not because of the reverse claim, i.e., the cells "don't know how many individuals to be yet".[20]

And we know that the cells of the trophoblast layer are *not* "non-embryonic"; all of these cells are *not* discarded after birth. The dorsal part of the yolk sac is incorporated into the *later embryo* as the primordium of the primitive glut. The allantois is represented in the *adult* human being as a fibrous cord, the median umbilical ligament extending from the apex of the urinary bladder to the umbilicus. The allantois is also involved with early blood formation. The primitive blood cells are derived *mainly* from the epithelial cells of blood vessels in the yolk sac and the *annuantois*.[21] Thus, the pre-embryo *is both* a "genetic" and a "developmental" individual.

Furthermore, two eight-cell stages of different parentage do not "fuse". Perhaps they mean "recombination". But recombination is not used in this context; it is associated with the crossing over of the male and female genes during the meiotic division of *fertilization* itself. A chimera and mosaic are caused by *non-disjunction* of the chromosomes—not by either "fusion" or by "recombination". And these latter two situations can only arise *before* the 3-cell stage, not at the 8-cell stage. A *mosaic* is formed by cells of the *same* genetic origin, not

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[20] J. Lejeune, testimony in *Davis v. Davis*, Circuit Court for Blount County, State of Tennessee at Maryville, Tennessee, 1989; Kischer (1993), op. cit., 58-59.

[21] Moore (1982), p. 33, 62-63, 68, 111 and 127; W.J. Larsen. *Human Embryology* (New York: Churchill Livingstone, 1993), 19, 37-40.

by different parentages. A *chimera* can be formed from cells of different parentages, but this takes place at the *zygotic* stage, not at the 8-cell stage.[22]

Also, monozygotic twinning *can* take place *after* 14 days.[23] As Kischer notes, their depiction of "multiplicity" and "individuality" is scientifically simplistic. "Individuality" is determined in many cases before 14 days; 30% of monozygotc twinning occurs at the 2-cell to 8-cell stages—and *not* by division of the inner mass; multiplicity of birth from dizygotic origin appears to be familial (i.e., genetic); factors determining monozygotic twinning are *not* known; and multiplicity beyond twinning may include a combination of dizygotic and monozygotic-derived embryos.[24] Too much emphasis has been placed on twinning. If it occurs (either from mechanical or natural means), it only signifies that one *individual* has given way to two individuals. The individuality of the latter in no way diminishes the *reality* of the individuality of the former. Finally, implantation does *not* start at the end of the second week post-fertilization, but between 5-6 days. The beginning of the formation of the primitive streak is between 15-19 days, disappearing by the end of the fourth week.[25]

The extent of the inaccurate science used by McCormick and Grobstein (and others) has been puzzling to many embryologists. C. Ward Kischer, a prominent embryologist, remarks that McCormick's new *moral* status (or lack thereof) for the so-called "pre-embryo" is derived from Grobstein, whose "new embryological states" are "simply not true". He argues that the "scientific data" they use has been highly selected and *leaves out the majority of other relevant data*:

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[22] Emery (1983), op. cit., 57, 83-85.

[23] K. Dawson, "Segmentation and moral status", in P. Singer et al, *Embryo Experimentation* (New York: Cambridge University Press, 1990); see also, Moore (1982), 133.

[24] Kischer (1993), op. cit., 58-59.

[25] Moore (1982), op. cit., 53, 56; Kischer (1993), op. cit. 59.

> It is not a question as to whether science can or cannot decide the question of personhood. Science is *not interested* in deciding personhood. However, if the socio-legal status of personhood cannot be decided without invoking what is known scientifically, then the *whole* of scientific data should be used and not arbitrarily selected bits and pieces of data. (emphasis in the original)
>
> . . . *Human embryology is now in danger of being rewritten* as a stratagem statement of current socio-legal, but also of late, even theological, issues. Unless the errors are corrected now, we will be in danger of entering a protracted period of *false concepts concerning our own development.*[26] (emphasis added).

In sum, McCormick and Grobstein's distinction between a genetic individual (a "non-person") and a developmental individual (a "person"), as well as their claims about a so-called "pre-embryo" cannot be scientifically sustained. The scientifically inaccurate term "pre-embryo" ought to be excised from the bioethics and legal literature.

—Ford [27] argues for "personhood" at 14 days. Before that there are only "groups of cells", a "potential" person, or a "biological individual". Until the blastocyst stage, the cells have not been *fully differentiated,* which takes place after the formation of the *primitive streak* (when no twinning can occur). But scientifically we know that full differentiation is not completed until *early adulthood*; [28] certainly *it is not* completed by the 14-15 day stage. Finally, twinning *can* take place after 14 days.

—Wallace [29] argues for "delayed fetal personhood" by setting up a series of analogies. Each of the "succeeding souls" can be described, he claims, in terms of the "*ma-*

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[26] Kischer (1993), op. cit., 57-63.

[27] N. Ford, *When Did I Begin?* (New York: Cambridge University Press, 1988), 137, 156.

[28] Moore (1982), op. cit., 1.

[29] W. A. Wallace, "Nature and human nature as the norm in medical ethics,", in E.D. Pellegrino, J. Langan and J.C. Harvey,

ture" nature of the individuals of its species (e.g., a mature plant, a mature animal, and then a mature human species). If these descriptions are transferred to his *model* of human embryogenesis—or "delayed fetal personhood"—we should then consider each of these natures as *"transient"* natures which successively evolve until the "rational" nature (or "soul") is "infused" and "personhood" is finally attained. The "rational soul" cannot be "infused" until the "matter" is appropriately organized—at about 3 months, and it is the "rational soul" which makes the organism *specifically human* and which *directs and organizes* the matter as *human.*

But, empirically we know there is no such thing as *two* kinds of natures of one and the same specific kind of thing. There are not both "transient" and "mature" natures of a plant, an animal or a human being. An acorn is genetically an oak—albeit a tiny one. The analogy is empirically invalid. Also, if the "rational" human nature which is "infused" about 3 months as Wallace claims, is actually descriptive of a *"mature"* human nature, is it true then that a 3 month fetus is actually a mature human being—and acts and functions as one?

Finally, the matter is "appropriately organized" by the end of syngamy, when empirically there is already a human being with "46" chromosomes. Immediately specifically *human* enzymes and proteins are produced (not tomato or frog enzymes); all of the information for cleavage, differentiation, implantation, etc. is *already* present; by 3 months specifically *human* functions, reactions, tissues and organ formations have *already* taken *place* (*empirically the formation of cabbages or giraffe* tissues and organs has *not* taken place). There is no biological need for a "rational soul" to be infused to make it something it *already* is, i.e., specifically *human* and directing *human* formations. This has *already been done* by something back at the zygote stage. The very concept of "delayed fetal personhood" is untenable.

(eds.), *Catholic Perspectives on Medical Morals* (Dordrecht: Kluwer Academic Publishing, 1989), 23-53.

—Some argue [30] for various "marker events" of "personhood" from about 8 weeks to birth or early childhood (brain criteria, i.e., "rational attributes", or sentience—i.e., the ability to feel pain). Thus "personhood" is determined by the appearance of the nerve net, cortex or integration of the brain as a whole, etc. These *physical* structures are the *physiological precondition* for the *capacity* for either sentience, or for "rational attributes" (e.g., self-consciousness, autonomy, loving, willing, interacting with one's environment, etc.); or they signal *the actual exercising* of those capacities.

However, the advocates for the definition of a human person *only* in terms of either "rational attributes", or *only* in terms of sentience, are using definitions with very specific philosophical presuppositions: generally Cartesian, rationalist or empiricist. These presuppositions contain quite serious theoretical difficulties *precluding* them from realistically being used in these "personhood" debates (see Section C).

The *scientific evidence* for these claims is empirically vague, scientifically controversial, and only "posited" as theories. Many scientists criticize that there is a reading into the scientific evidence more than is physiologically or conceptually possible. E.g., Jones [31] argues that there is *no scientific evidence* which demonstrates the correlation of "consciousness" and the organizing of the nervous

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[30] E.g., D.G. Jones, "Brain birth and personal identity", *Journal of Medical Ethics* 15:4 (1989), 173-178; H.-M. Sass, "Brain life and brain death; a proposal for normative agreement", *Journal of Medicine and Philosophy* 14 (1989), 45-59; C.A. Tauer, "Personhood and human embryos and fetuses", *Journal of Medicine and Philosophy* 10 (1985), 253-266; M. Lockwood, "Warnock versus Powell (and Harradine); when does potentiality count?", *Bioethics* 3:5 (1988), 187-213; Clifford Grobstein, "The early development of human embryos", *Journal of Medicine and Philosophy* 10 (1985), 213-236; M.V. Bennett, "Personhood from a neuroscientific perspective", in Doerr et al, *Abortion Rights and Fetal "Personhood"* (Long Beach; Cresline Press, 1989).

[31] Jones (1989), ibid., 178.

system. Scientifically there is *no valid parallel,* he argues, between "brain death" and "brain birth". "Brain death" is the gradual or rapid cessation of the functions of a *brain*; "brain birth" is the very gradual acquisition of a function of a developing *neural* system (which is *not* a brain). There are no *neurological* reasons, he states, for concluding that an incapacity for consciousness becomes a capacity for consciousness once this point is past. The nervous system of the 8-week fetus is quite *different* from that of the 8 month fetus or 2 year old child. Thus it is *impossible,* he argues, to recognize a distinct point of transition from a "non-brain" to a "brain", or from a non-functioning nervous system to a functioning one. Therefore, Jones concludes, it is impossible to recognize a distinct point of transition from a "non-person" to a "person". To echo the above comments by Kischer, a different Jones has remarked:

> The reproductive biologist cannot assign moral status to the sperm or the egg or the fertilized egg or any of the subsequent products that may result from this fusion. . . The reproductive biologist can help, however, by assuring that other scientists or those who wish to assert a moral status, and use a biological term or concept to do so, *know what they are talking about.*[32] (emphasis added)

Therefore *none* of these arguments for "delayed personhood" at various biological "marker events" during human embryogenesis are scientifically valid. Every one of them is grounded on inaccurate or misapplied science. Thus they have *failed* to prove any real valid *scientific* distinction between a human being and a human person.

C. Arguments for "Delayed Fetal Personhood" Are Based On Historically Inaccurate Or Refutable Philosophical Presuppositions

Many of these arguments for "delayed fetal personhood" also incorporate philosophical claims which are

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[32] H.W. Jones and C. Schroder, "The process of human fertilization: implications for moral status", *Fertility and Sterility* 48:2 (August 1987), 192.

historically inaccurate. The extent of the inaccuracies and the impact they could have in this case, as well as in the formulation of public policy, requires at least they be briefly identified. *Different conclusions about "personhood" follow from different philosophical definitions of a human being or a human person.* For further detailed research, references are provided.[33]

Most historical inaccuracies concern the theories of some of the major figures in the history of philosophy. Philosophers such as Plato, Aristotle, the scholastics, Aquinas and Descartes are misinterpreted, conflated, or mixed together indiscriminately. The internal contradiction within Aristotle or Aquinas of a "succession of souls" with their mainstream metaphysics of being is not even acknowledged. The two philosophies are often basically equated, with no awareness of their inherent differences. Both are sometimes conflated with scholasticism. Their theories of act and potency are constantly depicted incorrectly (often the source of the contemporary *misuse* of the terms "potential" or "possible" human being or person) as are their theories of being, human being, human "soul", and natural law. No mention is made of the severe *chorismos* or "separation" problems of Plato's or Descartes' mind/body split, nor of the destructive consequences of these theoretical problems on their definitions of a human person or scientific theories. Part of Aristotle's metaphysics is virtually grafted onto Englehardt's "metaphysics". Descartes' purely *immaterial* rational attributes are mixed invalidly with a Lockean *materialistic* theory of sentience, theoretically *negating* any conclusions. This is not a question of "interpretations" or of "translations"—but simply the misrepresentation of acknowledged historical fact. All of these historical inaccuracies and theoret-

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[33] For a detailed study see D. N. Irving, *Philosophical and Scientific Analysis of the Nature of the Early Human Embryo,* (doctoral dissertation, Georgetown University, Department of Philosophy, Washington, D.C., 1991 (especially the summaries on pp. 23, 53, 59, 70, 82, 114, 131, 145, 169, 205, 247, 259; as well as Chapter Five, and Appendices A and B).

ical contradictions in the premises become embedded in the conclusions of the arguments, determining the definition of "person" as well as the choice of biological markers which a writer selects for "delayed fetal personhood".

Also, historically, there are a number of different "schools" of philosophy which developed over the centuries which often came to different and contradictory philosophical conclusions about reality. Each "school" defined "*being*" differently, and therefore each defined a *human* being differently.[34] We are all heirs of this legacy —no matter what our academic "field" is.[35]

Some schools (e.g., Plato, many scholastics and Descartes),[36] argue a human being is defined as at least *two substances*—e.g., "soul" (or mind), and body—existing *independently* of each other. The major chronic theoretical problem with these dualistic definitions is that therefore there is a mind/body split; thus absolutely *no*

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[34] E. Gilson (1963), op. cit., esp. Chap. 1; K. Doran (1989), op. cit., 38-49.

[35] A.C. Crombie, *Medieval and Early Modern Science* (New York: Doubleday Anchor Books, 1959), 10; D. Allen, *Philosophy For Understanding Theology* (Atlanta: John Knox Press, 1985).

[36] G. Vlastos, *Plato: A Collection of Critical Essay* (Indiana: University of Notre Dame Press, 1978); Jowett, *The Dialogues of Plato* (New York: Random House, 1937); Rene Descartes, *Meditations on First Philosophy,* in J. Cottingham et al (trans.), *The Philosophical Writings of Descartes* (New York Press Syndicate of the University of Cambridge, 1984), 2nd Med., 12; for typical discussions of the theoretical problems of Cartesians, rationalists and empiricists, see: L.J. Eslick, "The material substrate in Plato", in E. McMullin, (ed.), *The Concept of Matter in Greek and Medieval Philosophy* (Indiana: University of Notre Dame Press, 1963); C. Fox, *Locke and the Scriblerians: Identity and Consciousness in Early Eighteenth-Century Britain* (Los Angeles: University of California Press, 1989); G. Meilander, *Challenging the Limits of Dualism* (University Park, PA; Pennsylvania State University Press, 1987); F. Wilhelmson, *Man's Knowledge of Reality* (New Jersey: Prentice-Hall, Inc., 1956); F. Copleston, *A History of Philosophy* (New York: Image Books, Vols. 1-9, 1962); E. Gilson (1963), op. cit.; N. Kemp-Smith, *A Commentary to Kant's "Critique of Pure Reason"* (London: The Macmillan Press Ltd., 1979), xxxiv, xlii, xliv.

interaction is explainable or actually possible between these two *separate* substances—i.e., between the immaterial "Mind" and the separated material "Body" (its physiological substrate.)

Some schools (e.g., rationalists) define a human being as only *one* of the two above "Cartesian" substances—e.g., Reason (or mind). As noted, if "personhood" is defined *only* in terms of "rational attributes", *then the following list of human beings are not persons*: e.g., the mentally ill, Alzheimer's and Parkinsonian patients, stroke victims, comatose and persistent vegetative state patients, drug addicts, drunks, alcoholics. Since empirically self-consciousness, autonomy, etc. are not actually present until *early childhood* [37], they must (and do) also argue for the permissibility of the infanticide of perfectly normal human infants. This rationalistic position has been generally articulated in the literature by writers such as Engelhardt and Tooley, who argue for the permissibility of infanticide.[38]

Some schools (e.g., empiricists) define a human being as only *one* of the other two "Cartesian" substances—e.g., Body or matter. This position is often used in the current literature to argue that some higher primates *are* persons, and some human beings are *not* persons. If one is arguing that a "human person" is defined *only* in terms of sentience or the physical integration or functioning of the brain, then one will also have to argue for the permissibility of infanticide, because empirically full integration and sentience is also not completed until several years *after* birth.

This is, indeed, the conclusion of writers such as Kuhse, Wells and Peter Singer.[39] Noting that he agrees with

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[37] Moore (1982), op. cit., 1.

[38] H.T. Engelhardt, *The Foundation of Bioethics* (New York; Oxford University Press, 1985), 111; M. Tooley, "Abortion and Infanticide," in *The Rights and Wrongs of Abortion*, M. Cohen et al (ed.) (New Jersey: Princeton University Press, 1974), 59 and 64.

[39] P. Singer and H. Kuhse, "The ethics of embryo research", *Law, Medicine and Health Care* 14:13-14 (1987); Kuhse and Singer, "For sometimes letting—and helping—die", *Law, Medicine*

Bentham's description of infanticide as "of a nature not to give the slightest inquietude to the most timid imagination", Singer states:

> If the fetus does not have the same claim to life as a person, it appears that the *newborn baby does not either*, and the life of a newborn baby is of *less value than the life of a pig, a dog, or a chimpanzee.* (emphasis added).[40]

Singer continues that we should put aside feelings based on the smallness, helplessness or—sometimes—cute appearances of human infants, and then we can see that *the grounds for not killing persons do not apply to newborn infants.*[41] This Court must consider the logical consequences of incorporating into law these rationalist and empiricist arguments which logically *must* conclude that many adult human beings are *not* persons and that the infanticide of perfectly normal human infants and children is permissible or consonant with the Constitution or acceptable public policy.

If the very theoretical structure of an argument is undermined by the use of inaccurate science and blatantly indefensible and objectively refuted problematic philosophical presuppositions, then the conclusions of these arguments should not be persuasive or accepted—much less incorporated into state or federal law.

CONCLUSION

For all of the foregoing reasons, the University Faculty For Life strongly urges the Court to grant the Petition for Writ of Certiorari of J.M., individually.

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and Health Care 3:40 (1986), 149-153; Kuhse and Singer, *Should The Baby Live? The Problem of Handicapped Infants* (Oxford University Press, 1985), 138.

[40] P. Singer, "Taking life: abortion", in *Practical Ethics* (London: Cambridge University Press, 1981), 122-123.

[41] *Ibid.*, 123-124.

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